

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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BRANDON M. ORAVETZ,

Plaintiff,

v.

J. PARR,

Defendant.

Case No. 3:19-cv-00530-MMD-CSD

ORDER

I. SUMMARY

Pro se Plaintiff Brandon M. Oravetz, who is currently incarcerated in the custody of the Nevada Department of Corrections (“NDOC”), filed this case under 42 U.S.C. § 1983 arising from events that occurred while he was incarcerated at Ely State Prison (“ESP”), alleging that Defendant J. Parr violated his Eighth Amendment right to be free from cruel and unusual punishment by unnecessarily beating him. (ECF Nos. 1-1, 4.) Before the Court is the Report and Recommendation of United States Magistrate Judge William G. Cobb¹ (ECF No. 83 (“R&R” or “Recommendation”)), recommending the Court deny Parr’s pending motion for summary judgment (ECF No. 63 (“Motion”)) and dismiss the unserved Doe Defendants without prejudice.² Parr timely filed an objection to the R&R (ECF No. 84 (“Objection”)), and Oravetz filed a response to Parr’s Objection (ECF No. 85). As further explained below, because the Court finds Parr’s Objection unpersuasive and agrees with

¹Judge Cobb retired after he issued the R&R. (ECF No. 86.) United States Magistrate Judge Craig S. Denney now presides over this case. (*Id.*)

²Neither party appears to object to Judge Cobb’s recommendation to dismiss the unserved Doe Defendants without prejudice, which the Court accepts and adopts. (ECF No. 83 at 2 n.1, 11; see *also* ECF Nos. 84, 85 (declining to address the Doe Defendants).) The Court will accordingly dismiss the Doe Defendants without prejudice, and without further addressing them in this order.

1 Judge Cobb's analysis of the Motion, the Court will overrule the Objection, adopt the R&R,
2 and deny the Motion.

3 **II. BACKGROUND**

4 As noted, Oravetz is proceeding in this case on a single claim for violation of his
5 Eighth Amendment right to be free from cruel and unusual punishment based on his
6 allegation that Parr used excessive force on him while preparing to transfer Oravetz from
7 one cell to another. (ECF No. 83 at 2.) Parr moves for summary judgment on this claim,
8 "arguing that he did not utilize excessive force against Plaintiff, that Plaintiff's claim is
9 *Heck*-barred, that Plaintiff's claim for injunctive relief is moot, and that he is entitled to
10 qualified immunity." (*Id.*) The Court incorporates by reference Judge Cobb's recitation of
11 the legal standard governing summary judgment motions. (*Id.* at 2-4.)

12 Judge Cobb first recommends the Court deny Parr's Motion because disputes of
13 material fact preclude summary judgment on Oravetz's claim. (*Id.* at 7-9.) Judge Cobb
14 explains that Oravetz's arguments in his response to Parr's Motion are consistent with
15 Oravetz's allegations based on his personal knowledge in his verified complaint. (*Id.*)
16 Because the Court must treat Oravetz's verified allegations as evidence, Judge Cobb
17 essentially states that he cannot simply accept Parr's version of events and grant him
18 summary judgment. (*Id.* at 7-8.) Judge Cobb further explains that the videos Parr proffered
19 as exhibits with his Motion do not show Parr is entitled to summary judgment primarily
20 because one cannot definitively tell from viewing them whether Oravetz mule-kicked Parr
21 when Parr first opened Oravetz's cell door, nor can one see or hear what happened in
22 Oravetz's cell when Oravetz alleges Parr was punching him in the head for no reason. (*Id.*
23 at 8-9.)

24 Judge Cobb next recommends the Court reject Parr's argument that Oravetz's
25 claim is *Heck*-barred because, while Oravetz was convicted of assault for the interaction
26 giving rise to this case at ESP and given 180 days in disciplinary segregation, he was not
27 referred for forfeiture of statutory good-time credits. (*Id.* at 9.) Judge Cobb accordingly
28 notes that Oravetz's claim here could not affect the duration of his sentence. (*Id.*)

1 Judge Cobb then recommends the Court reject Parr's argument that he is entitled
2 to qualified immunity because, viewing the facts in the light most favorable to Oravetz, a
3 fact finder could conclude that Parr violated his Eighth Amendment rights, and it was
4 clearly established at the time that an inmate has a right to be free from excessive force
5 used maliciously and sadistically to cause harm. (*Id.* at 9-10.)

6 Judge Cobb finally recommends that Oravetz's request for injunctive relief that he
7 not be sent back to ESP (he is no longer housed there) not be dismissed as moot because
8 the evidence tends to show Oravetz could be transferred back to ESP. (*Id.* at 10-11.)

9 **III. LEGAL STANDARD**

10 This Court "may accept, reject, or modify, in whole or in part, the findings or
11 recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1). Where a party
12 timely objects to a magistrate judge's report and recommendation, then the Court is
13 required to "make a de novo determination of those portions of the [report and
14 recommendation] to which objection is made." *Id.* The Court's review is thus de novo
15 because Parr filed his Objection. (ECF No. 84.)

16 **IV. DISCUSSION**

17 To start, the Court agrees with and adopts Judge Cobb's analysis provided in the
18 R&R. Parr raises several arguments in his Objection. (*Id.*) Though the Court finds none of
19 them persuasive, the Court briefly addresses them here.

20 Parr first argues Judge Cobb erred when he mentioned several statements Parr
21 and the other officers involved in attempting to transport Oravetz from one cell to another
22 allegedly made—according to Oravetz in his verified complaint—in Judge Cobb's R&R.
23 (ECF No. 84 at 3.) Parr argues these statements are inadmissible because they are
24 hearsay. (*Id.*) The Court need not—and does not—rule on whether these statements are
25 inadmissible hearsay because they are immaterial to the material factual disputes Judge
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1 Cobb identified as precluding summary judgment.³

2 While Parr focuses on what Oravetz says Parr said to him, Oravetz's verified
3 allegations about what Parr did to him are what matters here. Oravetz alleges in his
4 verified complaint that Parr rushed into his cell and repeatedly punched him in the face for
5 no reason. (ECF No. 1-1 at 4-5.) Parr says that Oravetz mule-kicked him, and then Parr
6 "used the minimal amount of force to place the inmate face down on the ground and gain
7 control." (ECF No. 63-1 at 4-5.) And Oravetz' claim is for excessive force. (ECF No. 4 at
8 4-5.) The material dispute is accordingly about what Parr did to Oravetz in the cell, and
9 what Oravetz may have done to provoke Parr. What Parr was saying to Oravetz during
10 this interaction may provide helpful context, but even if Parr said nothing to Oravetz during
11 the whole interaction, he still could have repeatedly punched him in the face for no reason.
12 A dispute of material fact accordingly remains.

13 Parr next relies on *Scott v. Harris*, 550 U.S. 372, 380 (2007) to argue that the videos
14 he proffered with his Motion show he is entitled to summary judgment because the videos
15 blatantly contradict Oravetz's verified allegations about what happened. (ECF No. 84 at 3-
16 5.) But the Court, having watched the videos (ECF Nos. 63-2, 63-3), disagrees. The Court
17 cannot say from its review of the videos either: (1) whether Oravetz mule-kicked Parr; or
18 (2) what happened once Parr and the two officers who accompanied him entered the cell
19 they were trying to move Oravetz from. It is equally plausible from the tier video (ECF No.
20 63-2) that Parr is punching Oravetz in the head for no reason, or that Parr is using the
21 minimum force required to restrain Oravetz. The Court cannot see into the cell during the
22 key seconds of the video or hear what happened therein. Indeed, somewhat contrastingly,
23 and as shown in the CERT video (ECF No. 63-3),⁴ there is no dispute that Oravetz left the
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25 ³Alternatively, "[i]nformation contained in an inadmissible form may still be
26 considered on summary judgment if the information itself would be admissible at trial." *Am.*
27 *Nat'l Prop. & Cas. Co. v. Stubbs*, 512 F. Supp. 3d 1132, 1134 n.2 (D. Nev. 2021) (citation
28 omitted). Oravetz could presumably attempt to get Parr or his fellow Corrections Officers
to admit while testifying at trial that they said these things. These statements would not be
hearsay if the people who allegedly said them confirmed that they did at trial.

⁴This video does not show what happened inside the cell either.

1 interaction bleeding from a laceration above his eye. This injury suggests the interaction
2 was violent, and accordingly tends to undermine Parr's version of events. In sum, unlike
3 the video at issue in *Scott*, the videos Parr proffered with his Motion do not establish that
4 Parr's version of events is correct.

5 Parr finally argues that Judge Cobb erred in his qualified immunity analysis because
6 it "is too generalized, not taking the circumstances of this case into consideration." (ECF
7 No. 84 at 5.) The Court disagrees. As Judge Cobb essentially states in his R&R, it was
8 clearly established at the time of the interaction that Parr could not repeatedly punch
9 Oravetz in the head or face for no reason. (ECF No. 83 at 10.) If Parr did, he would have
10 violated one of Oravetz's Eighth Amendment rights. (*Id.*) But the Court cannot say whether
11 he did based on the current record. *See supra*. Summary judgment is accordingly
12 inappropriate—both on the merits of Oravetz's claim and whether Parr is entitled to
13 qualified immunity. *See, e.g., Sandoval v. Las Vegas Metro. Police Dep't*, 756 F.3d 1154,
14 1160 (9th Cir. 2014) ("If 'genuine issue[s] of material fact exist[] that prevent [] a
15 determination of qualified immunity at summary judgment, the case must proceed to
16 trial.'") (citation omitted).

17 The Court thus overrules Parr's Objection. The Court will therefore accept and
18 adopt Judge Cobb's R&R in full.

19 **V. CONCLUSION**

20 The Court notes that the parties made several arguments and cited to several cases
21 not discussed above. The Court has reviewed these arguments and cases and determines
22 that they do not warrant discussion as they do not affect the outcome of the issues before
23 the Court.

24 It is therefore ordered that Parr's objection (ECF No. 84) to the Report and
25 Recommendation of United States Magistrate Judge William G. Cobb is overruled.

26 It is further ordered that the Report and Recommendation of United States
27 Magistrate Judge William G. Cobb (ECF No. 83) is accepted and adopted in full.

28 It is further ordered that Parr's motion for summary judgment (ECF No. 63) is

1 denied.

2 It is further ordered that all of the Doe Defendants are dismissed from this case
3 without prejudice.

4 DATED THIS 16th Day of February 2022.

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7 MIRANDA M. DU
8 CHIEF UNITED STATES DISTRICT JUDGE
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